UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

GRANGE DEBRIS BOX & WRECKING COMPANY, INC.[1]

Employer

and Case 20-RC-17987

TEAMSTERS UNION, LOCAL 624

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

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[1] The name of the Employer has been amended in accord with the parties' stipulation.

[2] In its brief, the Employer stated that it intended to appeal the Hearing Officer's ruling regarding the Employer's cross-examination of Driver Tom McNaboe and the Employer's attempt to elicit testimony from McNaboe and admit into evidence an exhibit, which concerned McNaboe's prior business experience as an independent contractor. The Employer asserts that such evidence would impeach and/or show the improbable nature of McNaboe's testimony that he did not read the owner-operator agreement with the Employer before he signed it. I find that the Hearing Officer did not err in making this ruling and that it did not constitute prejudicial error. I do not make credibility resolutions in this

2. The record establishes that the Employer, a closely held California corporation with an office and place of business in San Rafael, California, is engaged in the business of renting debris boxes. The parties stipulated, and I find, that during the 12-month period preceding the hearing, the Employer provided services valued in excess of $50,000 directly to business enterprises within the State of California that are directly engaged in interstate commerce. Based on such evidence and the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this matter.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The parties stipulated, and I find, that there is no contract bar to this proceeding. The Petitioner seeks to represent a unit comprised of the truck drivers employed by the Employer at its San Rafael, California facility; excluding all clerical employees, yard employees, managerial employees, guards and supervisors as defined in the Act. The Employer asserts that the petition should be dismissed because its drivers are independent contractors and the Petitioner contends that the drivers are statutory employees. At the time of the hearing, there were seven drivers working for the Employer.

Testifying at the hearing were Employer Owner/President Fred Grange, Office Manager Martha Heidinger, Dispatcher Debbie Ridgeway, and the seven drivers whose employee status is at issue.

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proceeding. Further, given that there is no dispute that McNaboe executed the owner-operator agreement, I find that whether or not he read it before he signed it is immaterial.

The Employer's Operation. The Employer has been in the business of renting debris boxes since the early 1960's. Its San Rafael, California, facility consists of an office and a yard area where debris boxes are stored. The Employer's primary customers are contractors, landscapers, homeowners and property maintenance companies, most of which are located in Marin County, California. Employer Owner/President Fred Grange and Office Manager Martha Heidinger run the Employer's day-to-day business from the San Rafael office.

The Employer owns and rents approximately 350 debris boxes of various sizes. The size of a debris box generally determines its usage. Six and ten yard boxes are typically used to dispose of dirt, rock and/or concrete. Boxes of other sizes are used for other kinds of debris, such as tree limbs, carpeting, kitchen cabinets, flooring, etc. Only about ten percent of the debris boxes carry the Employer's name. Customers do not pick up or drop off debris boxes rented by the Employer. The only means by which the debris boxes are transported to customers is on the trucks driven by the truck drivers whose status as employees is at issue herein.[3] No other individuals employed by the Employer perform this function.

The Employer's San Rafael facility is managed by Owner/President Grange and Office Manager Heidinger. Heidinger oversees the Employer's office employees, dispatching and customer service functions. Four employees work in the Employer's office, two primarily taking customer orders, performing dispatching duties and processing driver invoices; another who primarily performs accounts receivable duties,

[3] Owner/President Grange testified that a small percentage of debris boxes are transported by other means, such as by barge, but did not elaborate on who handles the transportation in this regard.

and a fourth employee who primarily handles collection work. Dispatching is done by sending e-mails to the drivers, who carry pagers that enable them to text message their replies to the dispatcher. The Employer also employs one yard employee, Oscar Jimenez, who maintains the debris boxes and the Employer's yard area. Jimenez reports directly to Fred Grange.

The yard and office employees are subject to the personnel policies contained in the Employer's employee handbook. The office employees are hourly paid, punch a time clock and work on regular shifts with specified break times. They also receive paid vacations and other fringe benefits from the Employer. Yard employee Jimenez is salaried and the record does not disclose whether Jimenez receives fringe benefits. The Employer withholds taxes, social security and other required deductions from the paychecks of the yard and office employees. While the record reflects that the office employees receive evaluations from the Employer, it does not indicate whether the yard employee also receives an evaluation. No party seeks to include the yard or office employees in the petitioned-for unit.

The Drivers. At the time of the hearing, seven drivers worked for the Employer, including: Dave Allingham, Tom McNaboe, Nick Hultberg, Nery Velasquez, Rich Stirling, James Banfield and Sodhi Singh. The Employer also refers to its drivers as "owner-operators" or "transporters." The record contains seven documents titled "Owner/Operator/Transporter Agreement" (the Agreements).[4] Six of the Agreements bear the signature of Employer Owner/President Grange and Drivers Dave Allingham,

[4] The Agreements bear the following dates: Dave Allingham (March 1, 1980); Thomas McNaboe (March 25, 2002); Nick Hultberg, Sr. (August 18, 2000); Rich Stirling (June 20, 2000); James E. Banfield (December 4, 1989); Nery Velasquez (May 7, 2002); and Sodhi Singh (May 20, 2003).

Thomas McNaboe, Nick Hultberg, Sr., James E. Banfield, Nery Velasquez, and Sodhi Singh respectively. The Agreement bearing the name of Driver Rich Stirling bears the signature of Employer Owner/President Grange and two sets of initials. While Grange testified that the initials are those of himself and Stirling, Stirling denied having ever entered into the Agreement. While I include the Stirling Agreement in my discussion of the Agreements, given the credibility dispute between Grange and Stirling, I make no finding regarding whether Stirling and the Employer are bound by this Agreement. I find that the resolution of this credibility dispute is not necessary in order to make my determination in this case.

Although there are differences and variations among the Agreements, they all generally contain the same or substantially similar provisions. Thus, each Agreement is effective for a period of 60 months (5 years) and is automatically renewed unless written notice of an unwillingness to renew is given by either party no later than 180 days prior to the Agreement's termination date. Each Agreement has a clause stating that the relationship being established between the Employer and the driver is an independent contractor relationship.[5] Each Agreement has a fee schedule with established piecemeal rates for the various jobs the drivers perform,[6] and each Agreement has a clause requiring

[5] All of the Agreements contain the following language under the heading entitled "Status":

> The parties intend to create, by this Agreement, the relationship of GRANGE and Independent Contractor and not an employee-employer relationship. Neither TRANSPORTER nor his employees are to be considered employees or agents of GRANGE at any time or for any purpose. Nothing herein shall be construed as inconsistent with that status. Those paragraphs of this Agreement which reserve ultimate authority in GRANGE are inserted in this Agreement solely to provide for a reasonable working relationship between GRANGE and TRANSPORTER and their inclusion does not in any way lessen or diminish the intent of the parties to create an independent contract relationship.

[6] This clause includes set rates for long and short exchanges, deliveries and pick ups of debris boxes.

the driver to submit to the Employer on a weekly basis on a "standard pay format sheet," an invoice for work performed by the driver. Each Agreement has a clause stating that the driver must own and operate his own truck, provide full time "continuous service on an exclusive basis," to the Employer's customers six days a week, provide certain specified equipment and keep it "neat, clean and operable."[7] Three of the Agreements (i.e., those of Singh, Hultberg, McNaboe), provide that the drivers must carry a door decal provided by the Employer. Each Agreement states that the "TRANSPORTER shall at all times put customer service and marketing of the company foremost." Each Agreement has a clause stating that the driver may take a vacation only between certain months unless prior written approval from the Employer is obtained.[8] Each Agreement

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[7] Each of the Agreements also contains a clause entitled "Transporter's Obligations," which states as follows:

> TRANSPORTER will own and operate his own truck equipped to perform under this Agreement. (no hired drivers.) TRANSPORTER agrees to provide continuous service on an exclusive basis to Grange customers. Continuous service specifically means that TRANSPORTER shall be available full time six days per week when required to fulfill a customers' orders. TRANSPORTER shall at all times put customer service and marketing of the company foremost. This shall include keeping himself and his equipment neat, clean, and operable. He shall at all times strive to maintain relations of the highest standards with both the customers and the community.
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> TRANSPORTER shall equip his truck with at least the following standard equipment:
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> One ten foot and one four foot log chain, one come along, two chain binders, one tarp, two ropes, one spare cable, one fire extinguisher, one set of flares, one county map, one tool box with tools and one sledge hammer.
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> [More recent Agreements (i.e. also contain additional language in this provision regarding the duty of the driver to provide a pager, radio and door decals provided by the Employer, and in some Agreements, also a cellular phone.]
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> * * *
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> TRANSPORTER shall be responsible for emptying all of GRANGE'S boxes unless the time involved would require hand labor in excess of ten minutes. In this event GRANGE will be responsible for removing the remains of the contents within the boxes.

[8] All of the Agreements contain the following clause regarding vacations:

contains a provision requiring the driver to carry a specified amount of liability insurance coverage on which the Employer must be named as an additional insured party, and a clause stating that the driver will hold the Employer harmless for any loss or damage, including attorneys' fees, incurred as a result of the driver's negligent operation, maintenance or use of the vehicle or improper placement of the Employer's debris boxes. All Agreements have a clause making the Employer liable for any malfunctioning of its debris boxes.

All Agreements give the Employer the exclusive option to purchase the driver's vehicle in the event of a breach or premature termination of the Agreement by either party, and require the driver to continue to service the Employer's customers until the sale of the driver's truck is completed. All Agreements have a clause stating that job assignments on Saturdays and during slack periods will be based on seniority and that if drivers with higher seniority decline work, those with lower seniority "shall be compelled to work."[9] In addition to the foregoing, each of the Agreements has a non-competition clause,[10] a non-assignment clause,[11] an arbitration clause stating that the resolution of all

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> Vacations may be taken during the low period which is between December 1 and March 1 by signing up and obtaining approval for it in advance, and provided there are no other TRANSPORTERS off during the same period. During the high period of March 1 to December 1 there shall be no vacations without prior written approval.

[9] Each of the Agreements contains a clause titled "Job Assignments/Dispatching" which states in relevant part:

> Those TRANSPORTERS with seniority (length of time under contract) shall have first option for Saturday availability and job assignments during slack periods. Conversely, TRANSPORTERS with lowest seniority shall be compelled to work should TRANSPORTERS with higher seniority decline.

[10] The non-competition clause provides that:

> In the event of breach, non-renewal or termination TRANSPORTER agrees not to compete with GRANGE in Marin County for the maximum period of time per admissible by law. In no event

disputes under the Agreement is by arbitration, and setting forth the procedure for arbitrating a dispute, and an indemnification clause under which the driver agrees to indemnify the Employer if it is held liable to a third party for acts and omissions of the driver based on a determination that the driver is not an independent contractor.

All of the Agreements also contain a clause stating that the Employer may adopt "Rules of Operation," "affecting dispatching, job assignments and seniority rules," which it will conspicuously post on its business premises, and that the drivers must comply with these rules so long as they have actual notice of them.[12] All of the Agreements also have a termination clause, which gives the Employer the right to terminate the Agreement without notice in cases of "proven [driver] dishonesty, drunkenness, willful/gross negligence or . . . a failure to report violation of rules of operation or neglect of duty," and specifying a written warning procedure to be used for first and second violations. [13]

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shall this non-competition be less than five years from the date of said termination or breach if the law permits.

[11] This provision states: "Neither party may convey or assign his contractual rights or interest herein without the prior written consent of the other."

[12] The "Rules of Operation" clause states:

> GRANGE has in the past and in the future may adopt Rules of Operations affecting dispatching, job assignments and seniority rules, TRANSPORTER shall comply with all such lawful rules, provided he has received actual notice thereof. These rules shall be posted by GRANGE in a conspicuous position on the business premises.

[13] This provision, with certain variations in a few of the Agreements, states as follows:

> TERMINATION BY GRANGE
>
> GRANGE shall have the absolute right to terminate this Agreement without notice for cause, such as for the proven dishonesty, drunkenness, willful/gross negligence of TRANSPORTER, or his failure to report violation of rules of operation or neglect of duty, the following procedures shall apply:
>
> A. For the first and second violations, GRANGE shall provide a written warning.

As discussed more fully below, with certain exceptions and variations, all of the Agreements generally contain certain provisions, which are plainly more advantageous to the driver than to the Employer. These include provisions regarding the payment of witness fees to drivers subpoenaed to testify on behalf of the Employer; giving the driver the right to decide whether to cross a picket line; obligating the Employer to provide the driver, upon request, a list of other drivers working for the Employer; and a liquidated damages clause, requiring the Employer to reimburse the driver for fifty percent of his prior year's gross revenues if the Employer breaches the Agreement without cause.[14] The Agreements also have a provision calling for an annual meeting of the parties to the Agreement to discuss driver fees and bonus plans.

All of the Agreements, except that of Driver Allingham, incorporate a list of "Frequently Asked Questions," and answers regarding the Employer's operations, working conditions, costs and other matters pertaining to the relationship being established by the Agreements. In response to the question of whether the driver is an

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> B. For the third violation, GRANGE may terminate this Agreement, provided TRANSPORTER has been properly warned. [Some of the Agreements also contain the following language: In the event this agreement is terminated by GRANGE for cause, then TRANSPORTER shall not collect any of the liquidated damages outlined in VIII above.]
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> C. The above provisions are not exclusive and GRANGE may pursue any other remedy available at law or equity.

[14] The "Liquidated Damages," clause reads as follows:

> In case of breach of this Agreement without cause by GRANGE which results in TRANSPORTER losing the benefits of this Agreement, GRANGE agrees to pay TRANSPORTER damages equal to fifty percent (50%) of TRANSPORTERS gross revenues from transporting debris boxes for the preceding twelve (12) month period. Said damages shall not be less than the amount equal to fifteen (15) exchanges per week. This amount will be paid in twelve (12) equal monthly payments to begin on the first day of the month following such breach.
>
> As used herein a "breach" shall not include assignment, sale, bequest, devise or other transfer of these contractual rights by GRANGE, the sale of GRANGE's business or the involuntary termination of business by GRANGE.

employee or an independent contractor, this portion of the Agreements provide that he is an independent contractor (referred to in the Agreement as an "IC"). In response to the question of what experience is required for the job, to answer given is "none," and that some of the Employer's best drivers have come from completely unrelated fields . . . ." In response to the question of how long most drivers have been with the Employer, this portion of the Agreements state that, "[m]any have been here 20 years or longer. The average is probably 10 years." To the question, "Can I haul for anyone else?" the answer given is:

> No, not without going through the company. However, IC's seldom have downtime. If things get slow, senior drivers usually want time off making more work for new IC's."

To the question, "Can I own more than one truck or hire a driver?" the response given is:

> No. We feel that IC's have a vested interest in the company and become part of our family.

To the question regarding what a driver can expect to earn, the answer given is between $80,000 and $120,000 gross income, and that net income should be about 20 to 50% of that amount. To the question regarding whether a driver can purchase a used truck, the response provided is that they may not do so without Employer permission.

The question and answer section of the Agreements also contains information regarding the days and hours of the Employer's operation, current pay rates, the paperwork that must be submitted in order for the driver to be paid, the average truck mileage per year, average operating costs, the tools and equipment required, the type of drivers' license required, and advice on purchasing a truck and roll-off body with a listing

of dealers. To the question regarding how seniority works, the Agreements give the following answer:

> There are two types of contracts. Tenured and Backup. The terms are the same in both, except that tenured applies to full time IC's and counts towards seniority, and backup does not. The tenured IC with the most years of uninterrupted service is the senior IC. He has the first right to work. The newest tenured IC has the least. This only applies if there is less than two hours of unassigned work on the dispatch board. So long as the senior IC's have at least two hours of work undone, junior IC's may haul equally. All working IC's share the same number of easy vs. hard, near vs. far boxes. Seniority does not grant a senior IC more profitable work.

To the question, "What is a backup IC?" the response given is:

> Certain IC's may choose to only work part time, or on call. They are backup IC's. An example might be a retired senior IC, an IC with a used truck and other interests, a seasonal IC, etc. All other contract provisions would apply. A backup IC cannot gain seniority because of the number of years served. Conversely, a senior IC who is not regularly available for work could be demoted to a backup IC. However, this has never been done.

Finally, to the question concerning what an applicant must do if he desires to move forward, the Agreements state that he must provide the Employer with a resume, financial statement and a refundable deposit of $5,000. The Agreements also state that the Employer will do background, DMV and credit checks on the applicant; assist the applicant in obtaining a Class B license, if needed; the applicant then selects the truck and roll off unit, radio gps unit, decals, ropes, and tarps; and the parties must review and negotiate the contract, etc. The Agreements also include a promise that the Employer will assist the driver by lending him a truck to use to practice driving, and provide a driver to accompany the applicant to the DMV in order to take his driving test.

Hiring of Drivers & Negotiation of the Agreements. The Employer finds driver applicants by advertising in local newspapers. Applicants responding to the advertisement meet with Owner/President Grange and Office Manager Heidinger, to discuss the Employer's operation, the truck driver's job and pay rates, and to enter into the Agreement.

Six of the Employer's seven drivers testified that they did not negotiate any of the terms of the Agreement that they signed. Rather, they testified that the Agreement was given to them by Owner/President Grange and they either did not think about negotiating any changes or understood that it was a take it or leave it proposition. For example, Driver Singh testified that Owner/President Grange presented him with the Agreement, told him that he had to sign it, and that he did so without attempting to negotiate over any of its terms. As noted above, Driver Rich Stirling denies signing the Agreement.

Owner/President Grange testified that he created the Agreements and that during the forty years the Employer has been in business, he has executed Agreements with between twenty and forty drivers. He testified that typically, his practice has been to meet several times with a driver in the course of negotiating an Agreement and that some of the drivers had had other persons review the document and advise them before signing it. According to Grange, as a result of negotiations he has had with individual drivers over the years, the Agreement has evolved and been modified in several respects. Grange testified, for example, that drivers had added provisions to the Agreement for their own benefit, such as a clause for witness subpoena fees, and an increase in the amount of the witness fees paid under this provision from $15 to $30; a clause requiring the Employer to give the driver a list of the other drivers working for the Employer; a clause

recognizing the right of the driver to decide whether to go through or work behind a picket line; and a liquidated damages clause. Grange could not recall the name of any of the drivers who had negotiated these changes. According to Grange, no driver has ever requested to change the clause stating that the intent of the parties is to establish an independent contractor relationship by their signing of the Agreement.

All of current Agreements contain provisions for witness fees, for drivers to obtain a list of other drivers employed by the Employer, and giving the drivers the right to decide whether to cross a picket line. Driver Allingham's Agreement, dated in 1980, has a witness fee amount of $15, while the Agreements for the other drivers, which are more recent than Allingham's, have a witness fee of $30. Five of the Agreements contain a liquidated damages provision.[15] The Agreements of Allingham and Banfield, which pre-date those of the other drivers, do not contain such a provision. There is no evidence that any of the drivers currently working for the Employer negotiated the witness fees, picket line, drivers' list or liquidated damages provisions.

Application of the Terms of the Agreements. Owner/President Grange testified that the Employer does not and cannot enforce the provision in the Agreements requiring drivers to provide continuous exclusive service to the Employer six days a week. In this regard, he explained that if a driver does not show up because he is hauling for someone else, the Employer cannot replace him because of the difficulty in finding:

> . . . the kind of person that wants to own his own truck, that can afford to buy his own truck, that wants to be a truck driver, that is capable of doing the kind of things these gentlemen do, and it takes a long time for

[15] The Agreements containing a liquidated damages provision include those of: Hultberg, dated August 2000; Stirling, dated June 2000; McNaboe, dated March 2002; Velasquez, dated May 2002; and Singh, dated May 20, 2003.

> someone to gain that experience. And typically they don't live in Marin County, the highest priced county in the nation, or anywhere around there. So there's nothing I can do about it.

The record contains no evidence that the Employer has ever attempted to enforce the exclusivity provision by disciplining, penalizing or terminating a driver. However, as discussed below, the record contains evidence of only a few isolated instances in the Employer's forty year history where the Employer's drivers have performed work for entities other than Employer's customers. The record discloses that the drivers generally work for the Employer five or six days a week, approximately eight hours a day, and that 99 to 100% of their incomes is derived from working for the Employer. Thus, in practice, the working arrangements between the Employer and the drivers appear to be consistent with the exclusive service provision contained in the Agreements.

With regard to the Rules of Operation provision in the Agreements, the record reflects that the Employer has issued several memoranda to drivers regarding various Employer operating procedures and policies. However, there is no evidence that any driver has ever been disciplined or penalized for not following these policies. In this regard, Grange and Heidinger testified that while some of the drivers have ignored the Employer's memos, for example, in their use of particular dumps, the Employer has made no attempt to discipline them. Grange and Office Manager Heidinger also testified that the Employer has never enforced the termination provision in the Agreements, and the record contains no evidence of any driver ever having been given notice, disciplined, penalized or terminated by the Employer.

With regard to the vacation provision in the Agreements, Grange and Heidinger testified that the Employer does not enforce this provision and does not require the

drivers to obtain prior approval before taking a vacation during any period of the year. In this regard, there is no evidence that the Employer has ever refused to permit a driver to take a vacation. However, the record reflects that the drivers generally do sign up for their vacations on a calendar posted in the Employer's office and/or they give prior notification to the Employer of their intent to take a vacation or time off.

With regard to the annual meeting provided for in the Agreements to discuss driver's fees and bonus plans, Grange testified that such meetings had not been held in years and that when they were held, it was with the drivers as a group and not as individuals. There is no evidence in the record concerning what bonuses, if any, the Employer has paid to drivers.

The record reflects that in many respects, the Employer's practice has been consistent with the provisions in the Agreements. Thus, the drivers generally own and operate their own trucks; have been required to purchase new trucks as opposed to used ones, unless the Employer has approved the purchase of a used truck; and the drivers have paid their own expenses for equipment, maintenance, fuel, liability insurance, and other expenses associated with their work. The record also reflects that with a few isolated exceptions, drivers own only one truck and hire no other helpers or drivers to work for them. The drivers are also held liable for damages that they cause to the Employer's customers.

As discussed below, and consistent with the terms of the Agreements, the record reflects that the Employer utilizes a seniority system for purposes of dispatching priority and weekend work that is based on when a driver signed his Agreement; how consistently

he works for the Employer; and whether he purchased and owns a *new* versus a used truck.

Whether Signing an Agreement is a Pre-Condition to Working for the Employer. The record reflects that five of the seven drivers began working for the Employer after signing an Agreement. Driver Stirling testified that he has worked for the Employer for about five years and has never signed an Agreement. Driver McNaboe testified that although he began working for the Employer in about August 1995, he did not sign an Agreement until 2002. According to McNaboe, he signed an Agreement because work had slowed and he discovered that the Employer was assigning more jobs to drivers who began working for the Employer after he started work, because they had signed an Agreement and he had not. In this regard, McNaboe testified that when he asked Grange why other drivers were getting more work assignments, Grange responded "I hired them, and they signed a contract, and you don't have a contract." Grange also told McNaboe during this conversation that he intended to hire another driver who would also have seniority over McNaboe, "because he's going to sign a contract." McNaboe testified that upon learning that he was losing work assignments to newer drivers because he had not signed an Agreement, he signed an Agreement without any attempt to negotiate with the Employer over its terms.

Prior Experience of Drivers and Driver Training. As noted above, the Agreements state that no experience is required for the truck driver job and state that the Employer will assist drivers in learning to drive a truck and obtain a license. Four of the seven drivers testified that they had had no prior truck hauling experience before working for the Employer; two of the drivers did not testify regarding their experience level; and

one driver testified that he had previously driven a truck for a freight transport company. All of the drivers testified that they rode along with another driver or drivers in order to learn the job when they began working for the Employer.[16] The drivers also testified that the Employer's office staff had instructed them in how to fill out the paperwork necessary for the job. Other than on-the-job training, there is no evidence that the Employer conducts any formal or mandatory training or testing program for drivers.

The Drivers' Trucks, Equipment & Truck Financing. Each of the seven drivers owns his own truck, although, as discussed below, the Employer sold one of the drivers a truck and loaned him most of the money to pay for it. All of the drivers' trucks are white, have two or three axles, and are equipped with a hydraulic lift. As indicated above, three of the Agreements provide that drivers must equip their trucks with a door decal provided by the Employer. At the time of the hearing, all but one of the drivers' trucks carried the Employer's name. The driver whose truck did not carry the Employer's name, Nery Velasquez, testified that while he usually had the Employer's name on a sign taped to his truck, the sign had come off and was not on his truck on the day of the hearing. Driver Allingham has both the Employer's name and the name of his company (Seth Enterprises) on his truck. Owner/President Grange testified that he does not require

[16] In this regard, Driver Allingham testified that he had no prior hauling experience before coming to work for the Employer, and that he rode along with three experienced drivers of the Employer when he started work. Driver McNaboe also testified that he had no prior experience with truck hauling and that he bought his truck from another Employer driver, Carl Hagen, who was quitting his job with the Employer. According to McNaboe, Hagen rode along with McNaboe for a few hours on McNaboe's first day of work. Driver Hultberg testified that he had no prior experience hauling, and that a friend who worked for the Employer introduced him to Grange and trained him to do the job. Driver Singh testified that he had no prior experience with truck hauling before he started working for the Employer. Drivers Stirling and Banfield did not testify regarding whether they had prior experience truck hauling. Only Driver Velasquez testified that he had driven a truck for a freight transport company before he came to work for the Employer.

drivers to put the Employer's name on their trucks. According to Grange, he had offered to buy decals for the drivers, but they had declined his offers in this regard. There is no showing that any driver has ever been penalized or disciplined for not having the Employer's name on his truck.

With regard to the purchasing of the trucks, as described above, the Agreements state that the Employer will assist drivers in purchasing a truck and provide a listing of potential dealers. The record discloses that in 2003, Driver Singh purchased a used truck from Grange with his own money as a down payment and a personal loan from Grange for the balance of the amount owed. In this regard, the record contains a letter dated May 20, 2003, from Grange to Singh, which states that it is "an addendum to the Owner/Operator/Transporter/Agreement, . . . that we are about to sign today." The letter explains that historically the Employer has added a new transporter (driver) whenever an old transporter leaves. It states that the Employer's contract refers to two types of contracts, a Tier 1 Contract, which is the type of contract that Allingham, Banfield, McNaboe and Hultberg have. The letter states that this type of contract is, "for a tenured transporter who is able to gain "seniority," usually by purchasing a new truck, and being willing to work full time, etc." The letter describes the second type of contract a "backup transporter" or "Tier 2 Contract" and states that Rich Stirling and Nery Velasquez have this type of contract. According to the letter, the two contracts are nearly identical but the backup transporter only qualifies for seniority within Tier 2. The letter states that, "In the past we have had transporters start as a backup and, later apply for seniority, and move to a seniority Tier 1 position. This required an amendment to the contract to confirm the tier change." The letter states that in both the Tier 1 and Tier 2 cases, the transporter

purchased his own truck elsewhere, with his own funds and arranged for his own financing. The letter explains that, "This was done partially to insure a stronger division between an owner operator and an employee." The letter states that Singh wants to sign the Employer's contract but has not been able to obtain financing to purchase a truck, but has $18,000 for a down payment. The letter offers Singh a new "Tier 3" category, which would be a back up for both the Tier 1 and Tier 2 drivers. It states that when Singh can obtain his own financing, he would join the Tier 2 category and if he purchased a new truck, he could join the Tier 1 category. In the letter, Grange offers to sell Singh a used truck for $60,000, with financing on the balance owed in addition to the $18,000 that Singh had already paid to Grange. The testimony of both Grange and Singh confirm that Singh gave Grange an $18,000 down payment and purchased his truck with a personal loan for the remainder of the truck's $60,000 cost from Grange.[17] According to Grange, this was the only occasion when he personally financed the purchase of a driver's truck.

Driver Hultberg testified that he had taken a personal loan from Grange in 2000 in order to "continue working," and to "pay for repairs [and] fuel."

Driver Allingham testified that Grange helped him find a dealer from whom to purchase his truck and showed him how to arrange for financing. Allingham also testified that Grange had loaned him a truck to use for a few months until his truck was delivered. Similarly, Driver Hultberg testified that when he began working for the Employer, he leased a truck from Grange until his truck was ready and that he had borrowed a truck from Grange when his truck was being repaired. Other drivers testified

[17] Singh testified that he was still paying off this loan at the time of the hearing and that he had fallen behind on his payments, but the Employer had taken no action against him.

that Grange had offered them trucks to use while their vehicles were being repaired, but that they had refused such offers.

The Agreements require the drivers to purchase and equip their trucks with certain specified equipment, such as tarps, hammers, flares, etc. The record reflects that the practice of the Employer and the drivers is consistent with this provision of the Agreements, except that the Employer pays for the pagers the drivers use to communicate with the dispatchers. In addition, Grange testified that he had purchased Global Positioning System tracking equipment for the drivers a few years before the hearing, but they had refused to install this equipment on their trucks. While the Agreements require the drivers to keep their equipment "neat, clean and operable," the record discloses that in practice, the Employer does not monitor whether they carry the required equipment or whether it is properly maintained. However, the record reflects that the Employer does keep copies of the required certifications for the drivers' equipment on file in its office.

The Employer allows drivers to park their trucks at the Employer's facility overnight or when they are not working, but only a couple of the drivers do so. Most of the drivers take their vehicles home. There is no evidence that the Employer charges a fee to the drivers who park at its facility.

Pay Rates, Expenses & Other Sources of Driver Income. The Agreements set forth the piecemeal pay rates drivers are paid for the various types of work they perform (i.e., long and short exchanges, pick ups and deliveries). The Employer also has an hourly standby ("truck time") rate that drivers are paid when they are delayed on their route through no fault of their own, such as when incorrect customer addresses are given; customers are not ready for the delivery or pick up of a container at the specified time; or

when customers require the drivers to do extra work. These rates are the same for all drivers except that drivers with three-axle trucks are paid more than those with two-axle trucks as a result of demands made by Driver Hultberg, who drives a three-axle truck. The higher rates for three-axle trucks are paid to the drivers of all such trucks, not only to Hultberg. The Employer does not provide the drivers with any holidays, paid vacation, sick leave or any other fringe benefits. As indicated above, the record does not disclose whether the Employer has ever paid bonuses to its drivers as referred to in the Agreements.

All of the drivers testified that 99 to 100% of their income is earned by working for the Employer. As indicated above, the Agreements state that historically drivers have grossed between $80,000 and $125,000 per year "depending on ability to learn the streets, maintain the truck and work the hours." The actual range of gross income for the seven drivers herein runs from about $63,000 to $114,000. As discussed below, the record reflects that the Employer's drivers only sporadically earn income by driving for companies other than the Employer and its customers.

Although the Agreements refer to the holding of an annual meeting between the Employer and the drivers for the purpose of negotiating changes in wages and bonuses, the record discloses that such meetings have not been held in recent years. As noted above, the record does not disclose whether any driver has received a bonus as referred to in this section. Grange testified that historically, drivers have negotiated rate increases with him on an individual basis. This is illustrated by Driver Hultberg's demand for a higher rate of pay for three-axle vehicles, which was then extended to other drivers of three-axle trucks. However, the record also shows that a few months before the hearing,

all of the drivers as a group met with Grange to demand an increase in the pay rate for certain routes involving more distant areas serviced by the Employer, and that the Employer agreed to increase such rates after the drivers collectively refused to handle these routes.[18]

All of the Agreements require that in order to be paid, the drivers must submit a weekly pay sheet to the Employer with invoices showing the number of deliveries, exchanges and pickups completed during the week, and any additional charges that they expect the Employer to pay for such as "truck time," and "free dumps," which are discussed below. Drivers must attach copies of customer orders and dump bills to their pay sheets in order to be paid**.** Although the Agreements require the drivers to use "standard pay format sheets," and the Employer supplies the drivers with such sheets, it allows them to also use their own forms. The Employer generally pays the drivers the week after they submit their pay sheets.[19]

Corporate and Business Status of Drivers and Treatment for Tax Purposes. Two of the seven drivers, Dave Allingham and Nick Hultberg, have created corporations. Allingham operates under the name Seth Enterprises, Inc., and Hultberg operates under the name Hultberg, Inc. Both Allingham and Hultberg file corporate income tax returns with the IRS and with the State of California, and report the earnings they receive from

[18] In this regard, Driver Allingham testified that between July and September, 2004,the drivers had asked the Employer to give them an increase of half and hour truck time to drive to certain areas which were a great distance from the Employer's facility, because of increases in the cost of fuel and other expenses.

[19] Driver Allingham testified that while he usually submits his invoice to the Employer on Mondays, he occasionally does so on Tuesdays. He further testified that in the 25 years he has worked for the Employer, there have been several occasions when he has held his invoices for more than a week and the Employer had been flexible in allowing him to turn them in late.

the Employer as corporate income. Other drivers operate as business entities for tax and insurance purposes. Thus, Driver Singh operates under the name Sodhi Trucking, Nery Velasquez operates under the name Velasquez Trucking and Rich Stirling operates under the name Rich Trucking.[20] The record reflects that all of the drivers deduct their business expenses from their taxes, including fuel, repairs, lease payments, licensing fees, registration, cell phone charges, tools, etc. The Employer does not withhold State or Federal taxes from the drivers' paychecks. The Employer issues 1099 forms to all the drivers except Allingham and Hultberg, whose businesses are incorporated.

Work for Competitors. Grange testified generally that he did not know if any of the drivers had ever transported debris boxes for the Employer's competitors. However, he also testified regarding a few occasions when drivers had performed work for other individuals and companies. In this regard, Grange testified that a few years before the hearing, Driver Allingham had performed work for a hazardous waste company called Hand Loggers.[21] Grange also testified that between three and five years before the hearing, former driver Dave Butler had stopped working for the Employer for a two or three month period in order to work for another company. While Grange also testified that there had been occasions when drivers were paid for hauling sheds owned by other companies, he could not recall any specific occasion when a driver had moved a shed for a company that was not also an Employer customer.

[20] The Employer's payment checks to Stirling are made out to Rich Trucking.

[21] In this regard, Grange testified that he learned of this work by Allingham when he discovered hazardous waste material in one of the Employer's debris boxes and was forced to investigate the matter and learned that it had been left there as a result of Allingham's work for Hand Loggers**.** The record does not disclose how much work Allingham had performed for this other company.

Opportunities for Drivers to Earn Extra Income. The record reflects that drivers have certain opportunities to earn income beyond the piecemeal rates paid by the Employer. Thus, drivers may earn extra money by the manner in which they choose to dispose of the dirt and other debris that they pick up from the Employer's customers. For example, they may sell the dirt to other customers or to other persons in order to earn extra money.[22] They may also use dumps that charge no fee or lower fees than that charged by other dumps, and receive $50 from the Employer because they save the Employer the cost of a higher dumping fee.

Drivers also negotiate and receive "truck time" pay from the Employer and its customers. Truck time refers to payments for time during which a driver is delayed through no fault of his own such as when he is given a wrong address; when something blocks his way; when a customer is not ready for a pick up or delivery at the scheduled time; or when a trip is particularly difficult due to steep roads and/or sharp turns, etc. The record reflects that sometimes drivers work out an arrangement for truck time pay directly with customers and sometimes they notify the Employer of the problem and the Employer contacts the customer and arranges for additional truck time pay. When a driver arranges for truck time pay directly with a customer, the customer may pay the driver directly or the Employer may bill the customer for the additional time and pay the

[22] The record shows that Driver Stirling has on occasion placed a sign on his truck stating "Dirt for Sale" and parked his truck in downtown San Rafael. Grange testified that Driver Allingham has earned extra money from Employer customer Scapozzi Construction, by picking up dirt from an Employer competitor in the Employer's debris box and selling it to Scapozzi for $75 a load. The record does not disclose how many times Allingham made this arrangement with Scapozzi, and Allingham denied knowledge of this situation. The record also shows that the Employer has provided leads to drivers regarding other customers who want to buy dirt. In the week prior to the hearing, the Employer gave Driver Singh the name of a customer who wanted to buy dirt and Singh delivered dirt to the customer and received between $600 and $700 in payment.

driver. When truck time pay is arranged by the Employer, the Employer pays the driver. The Employer has an established truck time rate of $55 an hour. The record reveals that Driver McNaboe arranged for half an hour of truck time pay with the Employer for jobs in the Four Corners area of Mill Valley due to the long distance of these locations from the Employer's facility. The record also discloses that the week before the hearing, Driver McNaboe told Grange and Heidinger that he had demanded an extra $20 from a customer because the job was too difficult, and that he had refused to return without receiving that amount each time. The record also discloses that drivers sometimes earn extra money by moving equipment or performing other hauling work requested by the Employer's customers.

Drivers also receive unsolicited and occasionally solicited gratuities from Employer customers. In this regard, Grange testified that Employer customers Carlisle Construction and General Contractor Mark Jancheski had reported to him that Driver Allingham had asked for and been paid gratuities of $50 and $100 to ensure that he would complete a job, as well as for his performance of additional work for them. Grange also testified that he had been informed by another customer, Baker Landscaping, that every time the drivers delivered debris boxes, they had asked for and been given tips ranging from $20 to $50. The testimony of the drivers is to the effect that they do not demand tips and that on an annual basis, their tips only amount to at most a few hundred dollars per year.[23] The drivers are not required to list monies they receive from the Employer's customers on the weekly invoice that they submit to the Employer.

[23] Driver Allingham testified that he has never requested, demanded or negotiated extra payments from customers in order to do a job, but customers have offered to give him tips. He testified that he had

Drivers' Control Over Work Time and Earnings. Drivers are generally given about eight jobs a day, which is sufficient to fill an eight to ten hour workday. Drivers may decide not to accept certain jobs and the Employer will put the jobs back up on the dispatch board or give them to other drivers. The income among the drivers during calendar year 2004 varied from $85,621.75 for Driver Hultberg to $45,623.96 for Driver Stirling. The record reflects that similar variations existed in calendar years 2002 and 2003.

Hiring of Individuals By Drivers. The Agreements expressly prohibit the drivers hiring employees to work for the Employer. The only evidence of a driver hiring another person to drive his truck involves Driver Stirling, who testified that he has never actually signed an Agreement with the Employer. Stirling testified that about two summers before the hearing, he had hired a driver to work for the Employer for about eight Saturdays because he (Stirling) was unavailable to work. According to Stirling, he hired the driver in order to "appease" Grange, who had told him that everyone was supposed to work on Saturdays. The Employer continued to pay Stirling for the work performed and took no action against him for hiring someone else to perform his work.

The record discloses that the drivers sometimes pay the Employer's yard employee to help service their trucks. In this regard, the record reflects that Drivers Allingham and Hultberg had paid the Employer's yard employee to perform services on their trucks. Allingham also hired laborers on one occasion to help him when a debris box fell off his truck and spilled dirt. Further, Allingham, through his company, Seth

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also received tips for doing extra work for customers and that he earned about $300 or $400 in tips per year.

Enterprises, has also made payments to his wife as an officer of the corporation. Other than these occasions, the record contains no evidence that drivers regularly hire employees to assist them or to handle work for the Employer.

Assignment of Contractual Rights. The Agreements expressly prohibit the drivers from assigning their rights and duties under the Agreements. However, Grange testified that the drivers may assign their contractual rights to other persons so long as the new person signs a contract with the Employer and names the Employer as an additional insured on his or her insurance policy. Grange testified, and the record reflects, that there have been occasions when drivers have sold their trucks to another driver, and the next driver signed a new contract with the Employer.

The Daily Work and Schedules of the Drivers. While the drivers have no set schedule for performing work for the Employer, the record reflects that each of the seven drivers typically works Monday through Friday and on some Saturdays, from about 7:30 a.m. until between 3:30 p.m. and 5:30 p.m. For example, Driver Allingham testified that he works Monday through Friday from 7:30 a.m. until 5 p.m. or 6 p.m., and on approximately one and a half Saturdays each month. He also testified that the Employer rarely assigns him more than one job at a time and that he generally does jobs in the order in which they are assigned. The assignments come by e-mail from the Employer's dispatchers on a text message beeper. Allingham testified that if he is going to take a longer than his normal half-hour lunch break, he notifies the Employer's dispatcher. For Saturday work, the Employer e-mails all drivers during the week, asking who will be available to work on Saturday. The drivers do not punch a time clock and are not required to record the hours that they work.

Each afternoon the dispatchers determine which customer orders must be filled the following day, prioritize the orders, and decide which driver will be assigned to handle each delivery and pickup. As indicated above, the Agreements provide that the Employer attempts to equalize the number of long and short trips assigned to drivers. If a customer has given specific directions regarding the placement of a debris box, the dispatcher notes the instructions on the customer's "tag" (i.e., invoice). The dispatcher e-mails the assignment to the driver through the Employer's computer system. Generally, one assignment is given to a driver at a time. The drivers receive assignments on their pagers and are free to accept or reject them.[24] If a driver rejects an assignment, the dispatcher sends the assignment to another driver or places it back on the dispatch board. If a driver accepts an assignment, he may send a text message to the dispatcher indicating his acceptance of the assignment. However, drivers do not always notify the dispatcher of their acceptance of an assignment, but instead perform the assignment and then notify the dispatcher that it has been completed. There is also evidence that drivers on occasion pull routes off the dispatch board before work or at the end of the work day and perform them without first notifying the dispatcher. Drivers also sometimes request and receive assignments to perform on their way to or from home.

Driver Allingham testified that he does not choose his assignments and does not often reject assignments from the dispatchers but he has done so when the assignment conflicts with a medical appointment or a special family event. Allingham also testified

[24] Sometimes drivers reject certain assignments as too difficult or because they are taking care of personal business. Sometimes they reject jobs as unprofitable because of the distance or time involved. Drivers generally prefer jobs that are near to the Employer's yard over those that are further away because close in jobs can be completed more quickly. However, as indicated above, the Agreements provide that the Employer attempts to balance the number of long and short trips given to drivers.

that during the period from July through September 2004, all of the drivers as a group had refused to accept jobs for customers located in areas that are more distant from the Employer's facility, such as Fern Canyon, Panoramic Area and Bolinas, due to the higher fuel and truck maintenance costs associated with such travel. This refusal occurred after the drivers had concertedly demanded that the Employer increase their rate of compensation for such trips and the Employer had refused.[25] Allingham testified that he has also turned down jobs because of mechanical problems or safety or liability concerns, but not simply because he did not feel like doing the job assigned. In this regard, Allingham testified that he had refused assignments in situations where a street was too steep or too narrow, turns were too sharp or rain had made the roads impassible. He further testified that if a customer asked him to put a box on a car deck, he would refuse the job because of the liability he could incur for damaging customer property or because he could damage his own equipment or the debris box.

Vacations and Time Off. As indicated above, under the terms of the Agreements, drivers must sign up for their vacations and vacations are not permitted during certain periods of the year. However, it does not appear from the record that the Employer has limited the period when drivers can take vacations or that it has ever denied a driver's request to take vacation. The drivers testified that they sign up for their vacations on a calendar posted in the office at the Employer's facility and that they have sometimes seen Grange's initials on this calendar.

[25] The record reflects that as of the date of the hearing in this case, the Employer had given the drivers the increased rate they had requested for these more distant areas.

With regard to taking off work on a particular day, it appears that the drivers generally inform the dispatchers that they are not available to work on a particular day or do not respond to e-mailed assignments from the dispatchers. The Employer's dispatcher testified that they do not always give such notice.

While the record contains no evidence that the Employer has denied a vacation request, or disciplined or terminated drivers for taking time off, under the seniority system established by the Agreements,[26] under the terms of the Agreements, the drivers may be penalized with respect to work assignments during slack periods and on Saturdays if they do not make themselves available for work on a consistent basis. Although the record does not indicate that the Employer has ever penalized a driver in making work assignments for this reason, it is plain from the record that the Employer views itself as having the right to adjust assignments under the established seniority system in this manner.[27]

The record reflects that the drivers usually visit the Employer's facility once or twice a day in order to pick up a different size debris box, pick up invoices, or to drop off their pay sheets and other payroll data. As indicated above, only a couple of drivers park their trucks at the Employer's facility and most take their trucks home. There is no evidence that the Employer charges a fee to the drivers who park at its facility.

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[26] I note that on one occasion, when Driver Hultberg refused an assignment as being too difficult, Grange insisted on riding along with Hultberg on the route. While Hultberg viewed Grange's action in this regard as penalizing him for objecting to the assignment, Grange testified that he was only trying to find out what the problem was with the route and to show Hultberg that it could be driven safely.

[27] In this regard, I note that the letter addendum to Driver Singh's Agreement, described above, shows that the Employer uses a tiered seniority system. Further, the testimony of McNaboe shows that he signed the Agreement when he learned that he was being passed over by the Employer in receiving dispatch assignments because he had not signed the Agreement and therefore had no seniority.

Adherence to Employer Policies. The Employer does not require the drivers to comply with the employee handbook policies that apply to its yard and office employees. Although the Agreements contain a provision stating that the Employer can prescribe rules for the drivers and that they can be given written warnings and their Agreements terminated if they fail to comply with such policies, there is no evidence of any specific situation in which the Employer has disciplined a driver. However, the record contains a number of memoranda that the Employer has issued to drivers concerning various matters pertaining to the dumping of debris, where to drop off debris boxes, dispatch procedures, complaints from the City of San Rafael, and union matters.[28] The Employer's witnesses

[28] These memoranda include a notification to drivers that dispatch is open at 7 a.m.; voice mail must be checked each morning; messages must be read and responded to throughout the day; and informing dispatchers of the map program used by the Employer to route its trucks. Another memo, dated March 21, 2001, notified drivers that they could go to the Richmond Dump or Syar only if dispatched to it; another notice to drivers dated January 9, 2002, regarding inter alia, a new temporary policy regarding dispatching to the Richmond Dump, stating that if a driver is dispatched to Richmond, the box should go to Richmond at that time; if the box is at the end of the day and it is too late to take it to Richmond, then it becomes the driver's first assignment the next morning; and the pink tag from Richmond must match the date of the dispatch sheet or there will be no pay for that tag. The same notice also states that all loaded boxes should be dropped in the yard and not left around the neighborhood. In addition, the record contains an undated document entitled "New Procedure," which basically provides that in the morning, drivers will be given two assignments and they must page the dispatcher that the first assignment is complete or they may be delayed and lose money. Another memo entitled "Notice to Drivers," apprised drivers that starting August 24, 2004, all direct rock and concrete six and ten yard boxes were to be filled at dirt prices and asking drivers to bring in any dump tags with errors on them for a $10 reward. Other memos dated June 2003, dealt with informing drivers of dump and city policies that could affect them and how to respond by e-mail to the dispatcher. Memos in 2003 and 2004 dealt with the problem of drivers dumping concrete at the Syar Dump that had other types of debris in the box, a practice that was inconsistent with an agreement for free dumping between that dump and the Employer. The September 2004, memo told drivers that they could continue to dump concrete that was clean of other debris at the Syar Dump for free. This memo states, "It will not be considered a free dump unless it is free to the company." The memo asks the drivers to initial it when they have read it. Another memo issued in September 2004, dealt with complaints from the City of San Rafael and the police department and public works department about boxes left on the street.

Another memo issued by the Employer is a notice to all drivers to attend a "mandatory" meeting on September 20, 2004, to discuss the election petition in this case.

The record also contains a document dated September 17, 2004, titled "Notice to Our Independent Contractors Concerning the Teamsters False Promises. Get the Union to Sign a Guarantee," which includes the following statement, "Why do our drivers need an outside party to bargain for you and take your hard-earned money in dues which is approximately $17 to $63 per month or $756 per year

testified that although the Employer has issued and posted memoranda requesting that drivers communicate with the Employer about completed assignments and adhere to its policies regarding dumping preferences, several drivers have continued to adhere to their own practices and have not abided by the Employer's policies and the Employer has not disciplined them for doing so. In this regard, according to Grange, drivers still take debris to the Richmond dump because they can make more money by going there even though the Employer has issued memos to them discouraging this practice. With regard to the memorandum requiring all drivers to attend a meeting on September 20, 2004, Grange testified that this memorandum was drafted by the Employer's labor consultant and that this was the only occasion when the Employer had ever required all drivers to attend a meeting.

Personnel Files & Evaluations. The record discloses that the Employer does not prepare evaluations for the drivers or maintain personnel files on them. The Employer does, however, maintain folders where it places the drivers' paychecks, job invoices and other memoranda.[29]

Practice Regarding Damages to Customer Property. Drivers are required to pay for any damage they cause. When a customer complains about damages caused by a

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along with other expenses like initiation fees of $756, when we know that a happy group of employees is necessary to our success?"

The record also contains a letter from the drivers to Grange asking for certain raises in rates in order to keep up with rising fuel and other costs. EXH 15

[29] According to Driver Allingham, the Employer has a standup rack in its office where folders for drivers are kept. The Employer puts the copies of the invoices for the drivers in these folders as well as paychecks and other memos to the drivers regarding information that it wants to convey to them. Memos are also sometimes left on the desk in the office. Employer memos sometimes have a place where each driver is supposed to initial to show that he has read the memo.

driver, the Employer informs the customer that the drivers are independent contractors and are responsible for such damages. The Employer then notifies the driver about the complaint and gives them the customer's information. Grange testified that the Employer does not discipline drivers for damaging customer property, and the record contains no evidence of it having done so.

Analysis. Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The Board determines whether an individual is an employee or an independent contractor by applying the common law agency test and considering all aspects of the individual's relationship to the employing entity. *Argix Direct, Inc*., 343 NLRB No. 108 slip op at 4 (December 16, 2004); *Roadway Package System, Inc.*, 326 NLRB 842, 849-850 (1998). See also, *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998). In *Roadway*, the Board rejected the argument that the predominant factor in this analysis is whether an employer has a "right to control" the manner and means of the work performed by the individual whose status is at issue. The Board cautioned that the right to control factors listed in the *Restatement (Second) of Agency* are not exclusive or exhaustive, and that, in applying the common-law agency test, it will consider "all the incidents of the individual's relationship to the employing entity." *Roadway, supra* at 850; See also, *Dial-A-Mattress, supra* at 892.

As recently set forth in *Pan American Grain Co., Inc*., 343 NLRB No. 47 slip op. (October 26, 2004), with regard to determinations involving employee versus independent contractor status:

> Among the many factors that the Board has considered in making this determination in the cases of truck drivers/owners are whether the individuals: perform functions that are an essential part of the company's normal operations; receive training from the company; do business in the company's name with assistance and guidance from it; are prevented from engaging in outside business; provide services under the company's substantial control; have substantial proprietary interests beyond their investment in their trucks; lack significant entrepreneurial opportunity for gain or loss; leave their vehicles overnight with the company; are subject to discipline by the company, *Id.* at 851-852; have control and responsibility for their own employees; select and acquire their vehicles; are responsible for the financing, inspection, or maintenance of the vehicles without involvement by the company; are guaranteed minimum compensation by the company; are required by the company to provide delivery services each scheduled workday, *Dial-A-Mattress Operating Corp.,* 326 NLRB at 891-892; make their own arrangements for the parking and storage of the trucks when not in use; are free to decide whether to make their trucks available to the company on a particular day, *Portage Transfer Co.*, 204 NLRB 787, 787-789 (1973); receive direction from the company regarding the route to be used to a delivery point; are issued identification cards by the company; *National Freight, Inc*., 146 NLRB 144, 146 (1964); operate trucks bearing the company's name; control the means by which he or she achieves the company's ends; *Deaton Truck Lines, Inc*., 143 NLRB 1372, 1376-1378 (1963), affd. 337 F.2d 697 (5th Cir. 1964), cert. denied 381 U.S. 903 (1965); and have social security or other taxes withheld from their paychecks by the company; *Bowman Transportation, Inc.*, 142 NLRB 1093, 1096 (1963).

Finally, the burden is on the party asserting independent contractor status to show that the classifications in question are independent contractors. *Argix Direct, Inc*., *supra*; *BKN, Inc*., 333 NLRB 143, 144 (2001).

Applying these factors to the instant case, I find that the Employer's truck drivers are employees within the meaning of Section 2(3) of the Act and not independent contractors. Although, as in most cases involving independent contractors, there is some evidence that supports a contrary conclusion, I find that the balance in this case weighs heavily in favor of a finding of employee status.

Thus, it is plain that the drivers perform functions that are an essential or "core" part of the Employer's normal operations. See *Roadway Express, supra*; *Slay Transportation Company, Inc*., 331 NLRB 1292 (2000). The Employer's business is to rent, deliver and pick up debris boxes for its customers. It directly bills its customers for all of these services. If the Employer did not deliver and pick up its debris boxes, it would have no business, as there is no other means by which customers could make use of its boxes. The drivers here use specialized trucks in order to deliver the debris boxes and customers do not and cannot pick up or drop off the boxes themselves. Nor does the Employer have any other employees or personnel who make deliveries of its debris boxes. In sum, unlike the situations in *Pan American Grain Co., Inc*., and *Dial-A-Mattress*, where the employers were engaged in businesses involving the manufacture, processing and sale of a product, here the Employer's business includes the work of the drivers, which is transporting debris boxes. In this regard, this case is similar to *Roadway Express*, in which the drivers at issue were found to be employees rather than independent contractors, based in part on a finding that they performed an essential part of the company's business, which was delivering small packages. The only difference between *Roadway* and this case, which I find to be insignificant, is that instead of delivering small packages, the drivers here deliver and pick up debris boxes, and the Employer is paid for the rental period that the customers keep the boxes. See also *Slay Transportation*, 331 NLRB at 1294.

While the Employer does not have a formal training or testing program for its drivers, the record reflects that the drivers generally come to the Employer with little or no experience, and the Employer assists them in gaining truck hauling experience. Thus,

the Agreements state that no prior experience is necessary to drive for the Employer and the record reflects that some of the Employer's best drivers come from totally unrelated fields. The Agreements also offer the Employer's assistance to drivers in learning to drive and in obtaining the necessary licenses by using the Employer's trucks to practice and the Employer's drivers to assist them. The evidence discloses that new drivers ride along with the Employer's more experienced drivers and the more experienced drivers ride with along with the new drivers in order to help them learn the job. In this regard, the instant case is quite similar to *Roadway*, 326 NLRB at 851, where the drivers were not required to have any experience and gained assistance from Roadway's personnel in orienting them to the job.

Further, the record shows that some of the Agreements expressly require the drivers to carry the Employer's name or logo on their trucks, and that in practice all but one of the drivers had the Employer's name on their trucks at the time of the hearing. It is also notable that all of the drivers' trucks are white and specially modified to enable them to transport the debris boxes rented by the Employer. In addition, the Agreements provide that the drivers must "put customer service and marketing of the company foremost." This evidence is similar to the situation in *Roadway*, where drivers were required to do business in the name of the employer and operated vehicles carrying the employer's logo. See also *Slay*, *supra.* This factor also serves to distinguish the instant case from *Pan American*, where the drivers were found to be independent contractors, based in part on a finding that their vehicles did not carry the employer's logo.

The evidence establishes that the drivers in the instant case provide their services under the Employer's substantial control. Their Agreements prohibit them from working

for other employers, owning multiple vehicles and from hiring other drivers to perform their work. Although the Employer's owner testified that the Employer does not and cannot enforce these prohibitions, the record shows only a few isolated instances over the Employer's forty years of operation, when its drivers have performed work for other companies, owned more than one truck or used another person to perform their work. Thus, the evidence establishes that the Employer's drivers drive almost exclusively for the Employer and its customers; perform the work themselves; do not hire other employees; and do not utilize multiple trucks. See also *Slay, supra.* These factors serve to distinguish this case from *Argix Direct, Inc., supra*; *Dial-A-Mattress Operating Corp.* and *Pan American,* where the drivers found to be independent contractors owned multiple vehicles and regularly hired helpers and other drivers to perform their work. Indeed, the express prohibition contained in the Agreements against owning multiple vehicles, working for other businesses and hiring employees, makes the instant case an even stronger fact pattern for a finding of employee status than that presented in *Roadway*, where the drivers at issue had a contractual right to use their trucks for outside business activity but were hampered from doing so by practical constraints created by their employer.

The substantial degree of control exercised by the Employer over the drivers' terms and conditions of employment is further demonstrated by its requirement that drivers purchase a *new* truck unless it gives them permission to buy a used one. The new versus used truck requirement is hinged to a seniority system which gives drivers owning new trucks higher seniority for work assignment purposes. The trucks must also be specially equipped to handle the Employer's debris boxes. The evidence establishes that

the Employer guides the drivers through the process of purchasing and financing their trucks; has sold a truck to at least one driver and financed it; has made loans to at least one other driver to pay his operating expenses; and has loaned and offered to lend trucks to drivers while they await the delivery of their newly purchased trucks and during periods when their trucks are being repaired. In addition, by the terms of the Agreements, the Employer maintains the option to purchase the truck of any driver who quits working for it, and to require him to continue working for it until it finds a suitable replacement. This system is described by the Employer in its letter addendum to the Agreement with Driver Singh. In addition, this system gives the Employer spare vehicles to offer to drivers when their trucks are out of service. By such requirements, the Employer has created a system, similar to that created in *Roadway*, which makes "the necessary, custom vehicles readily available to prospective drivers, and enables drivers who want to end their relationship with it to easily transfer their vehicles to incoming drivers." *Roadway*, 326 NLRB at 852. I further note that the Employer allows drivers to park their trucks at its facility for no charge, and at least a couple of them have done so.

The Employer's substantial control over the terms and conditions of employment of the drivers' is also demonstrated by the seniority system it applies to them pursuant to which more senior drivers are given priority in obtaining work assignments during slow periods and on Saturdays, so long as they consistently make themselves available for work. Because 99 to 100% of the drivers' income is derived from working for the Employer, this seniority system provides a strong disincentive for drivers to deviate from the terms of their Agreements.

The Employer's control over the driver's terms and conditions of employment is further demonstrated by the vacation provisions in the Agreements, which require the drivers to sign up in advance for vacations. In this regard, the record shows that while the Employer does not attempt to limit driver vacations, it does post a calendar and its drivers sign up for vacations on the Employer's calendar or they notify the Employer in advance when they want to take vacation or time off.

The substantial control the Employer exercises over the drivers' terms and conditions of employment is also demonstrated by the provisions of the Agreements that give it the right to make rules of operation and to issue warning letters to and terminate the contracts of drivers who fail to comply with its rules. Although the record contains no evidence that the Employer has actually disciplined or terminated drivers, the record reflects that it has issued memos to the drivers regarding operating procedures they should follow. Even in the absence of evidence of actual disciplinary actions, the very existence of this provision in the Agreements shows that the Employer has retained the right to issue warnings to drivers and to terminate them if they disobey its directives. I also note that the seniority system established under the Agreements rewards drivers for long and consistent service and thus serves to control their conduct. See *Roadway*, 326 NLRB at 854.

The lengthy term of the Agreements, as well as the actual long-term working relationships between the Employer and its drivers, also support the conclusion that the drivers are employees rather than independent contractors. Thus, each of the Agreements is for a five-year term, and the average length of time that drivers have worked for the

Employer is ten years. Indeed, one of the drivers has worked for the Employer for 24 years, and another for 15 years.

Finally, the Employer's control over the drivers' working conditions is further evidenced by the piecemeal rates it has established to pay the drivers which, with few exceptions, are the same for all of the drivers.

With regard to the drivers' investment and entrepreneurial opportunity, while I recognize that two of the drivers have incorporated and others act as businesses; that they generally purchase their own trucks and pay their own expenses; and that the Employer does not make tax and social security deductions for them, I do not find these factors to be controlling or to establish significant entrepreneurial opportunity under the circumstances presented in this case. As the Seventh Circuit noted in *J. Huizinga Cartage Co., Inc. v NLRB*, 941 F.2d 616, 620 (7th Cir 1991) enforcing 298 NLRB 965 (1990), if independent contractor status could be conferred merely through the absence of payroll deductions, "there would be few employees falling under the protection of the Act." Given the substantial control the Employer exercises over the drivers as described above, the Board's observation in *Standard Oil* Co., 230 NLRB 967, 972 (1977), is equally applicable here: "[I]t is clear that, unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound business practices, and to be able to take financial risks in order to increase their profits." See also *Roadway*, 326 NLRB at 852. Thus, the evidence discloses that the Employer's drivers have no substantial proprietary interest beyond their investment in their trucks and equipment. Their Agreements forbid them from owning multiple trucks, hiring other drivers, and working for other companies, and require them

to work for the Employer eight to ten hours a day, six days a week. As the Agreements note, the drivers "seldom have downtime."[30] While the Employer may not strictly enforce these provisions, the Agreements clearly give it the right to do so at any time. Further, the drivers' incomes are virtually 100% derived from the work they perform for the Employer. Thus, the Employer essentially controls the drivers pay rates. It is also significant that while the drivers are not guaranteed a minimum income, the payment of established piecemeal rates set by the Employer; the payment of truck time for delays that the drivers encounter; and the seniority system established under the Agreements, provide drivers with a certain level of job and income security. Thus, like the zone core settlement structure in *Roadway*, the Employer's system minimizes the entrepreneurial risks faced by the drivers. In addition, the Employer's assistance to drivers in selling and financing trucks, making loans to cover expenses; offering loaner trucks; and letting drivers park at its facility, all serve to minimize the drivers' financial risks.

While I recognize that the drivers also possess certain limited means of gaining additional income (i.e., by using certain dumps, obtaining tips, and performing extra work for Employer customers and occasionally working for other companies), and take some risks, such as those involved in cost fluctuations in the price of fuel, etc., overall it appears that their individual entrepreneurial opportunities are quite limited by the provisions contained in their Agreements, and by the practical limitations presented by working for the Employer. This conclusion is buttressed by the fact that the drivers

[30] In this regard, I have considered the Employer's evidence regarding instances where drivers performed additional work for Employer customers and occasionally others, and were paid directly by those businesses or persons. However, I do not consider the evidence that drivers have sporadically done such work to constitute significant outside employment.

found it necessary to *collectively* demand a higher pay rate for more distant trips from the Employer.

While the Employer does not dictate what routes drivers must use to reach its customers and drivers sometimes turn down jobs because they are too difficult or time consuming, the record discloses that at least on one occasion, when a driver refused to handle a route, Owner Grange insisted on driving the route with the driver. Moreover, the Employer's dispatcher generally does not give a driver a new job assignment until he has completed his current assignment. This practice gives the Employer control over the prioritization of assignments and the timing of deliveries, and gives the drivers a strong incentive to do the route assigned as quickly as possible.

In addition to the foregoing factors, it is plain that even though the Agreements characterize the relationship being established as that of an independent contractor, they nevertheless have numerous provisions which contradict this characterization, including the exclusivity provision, the seniority provisions, and the prohibitions against owning multiple trucks, hiring other drivers or working for other companies. Moreover, the statement in the Agreements that the drivers "have a vested interest in the company and become part of our family," provides further support for the conclusion that what is really being established here is an employer-employee relationship. Moreover, while the Agreements may provide that the parties are creating an independent contractor relationship, and the tax and benefit systems are structured as such, this factor has also been present in numerous other cases in which the Board has found drivers to be employees and is clearly not a determinative factor. See e.g., *Time Auto Transportation*, 338 NLRB No. 75 (2003); *Corporate Express Delivery Systems*, 332 NLRB 1522, 1524

(2000), enf'd 292 F.3d 777 (D.C. Cir. 2002); *Slay*, 331 NLRB at 1293; *Roadway*, 326 NLRB at 848; *Elite Limousine Plus*, 324 NLRB 992, 994 (1997).

Upon careful consideration of all the evidence in light of the above factors, I find that the drivers are employees under the Act and not independent contractors. In reaching this conclusion, I primarily rely on the following factors: the exclusivity provisions of the Agreements and the fact that in practice it appears that the parties have generally adhered to these provisions; the prohibitions in the Agreements against drivers owning multiple vehicles and hiring drivers, and the fact that in practice, these prohibitions are largely adhered to by the drivers; the seniority provisions in the Agreements; the drivers performance of an essential part of the Employer's operation; the lack of prior experience by the drivers; the Employer's assistance to the drivers with regard to training, lending trucks, making loans and selling trucks to them; the fact that some of the Agreements require that the trucks carry the Employer's name and all but one of the trucks do so; the Employer's retention of an option to buy the drivers' trucks when they stop working for the Employer; the dispatching of the drivers solely by the Employer; the fact that the Employer generally assigns only one job at a time to the drivers, which means that it exercises control over the prioritization of their work; the Employer's use of an established fee schedule that with few exceptions applies to all of its drivers; the use of truck time to reimburse the drivers for unexpected delays they face on their routes; the lengthy term of the Agreements; the evidence of long-term working relationships between the drivers and the Employer; and the fact that 99 to 100% of the drivers' income is derived from the Employer.

In finding that the drivers are employees, I have considered the Employer's arguments regarding *Roadway* and *Dial-A-Mattress*. However, I find that this case has many more factors in common with *Roadway*, as discussed above, than *Dial-A-Mattress*. Thus, I find, as the Board found in *Roadway Package System*, 326 NLRB at 851, that the Employer's drivers do not operate independent businesses but, rather, perform functions that are an essential part of the Employer's normal operations; they need not have prior training or experience, but receive assistance in this regard from the Employer; they do business in the Employer's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the Employer's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All of these factors weigh heavily in favor of my finding of employee status, as they did in the Board's finding of employee status in *Roadway.*

I also find that the Employer's reliance on *Dial-A-Mattress* is misplaced, given that the drivers in that case did not perform a core function of the employer's business and that many of the drivers in *Dial-A-Mattress* owned multiple trucks and had their own employees, whereas the drivers in this case own one truck, have no employees, and drive almost exclusively for the Employer.

In addition, in reaching my decision that the drivers in this case are employees, I have carefully considered the Board's recent decision in *Argix Direct, Inc*., *supra*, in which it found the drivers at issue to be independent contractors, and find that *Argix* is distinguishable from the facts in this case. Thus, in contrast to the instant case, in *Argix,* there were no restrictions on the drivers use of their trucks for purposes other than

delivering for the Employer, and in fact, two drivers in *Argix* withheld services from the employer in order to drive for other companies one day each week. Such evidence contrasts with the instant case where the drivers are forbidden under the terms of their Agreements from driving for other companies and the evidence regarding their having performed work for companies other than the Employer is isolated and sporadic. Second, the drivers in *Argix* were allowed to own multiple trucks and hire drivers and helpers and they did so, whereas the drivers in the instant case are forbidden from doing so under their Agreements with the Employer and have rarely done so. Third, in *Argix*, the employer did not provide the drivers with any financial assistance in buying their trucks or paying their expenses, whereas in the instant case the Employer has done both. Fourth, in *Argix*; the drivers' vehicles were not modified specifically to suit the needs of the employer's business, as has been done in this case. Finally, there was no seniority structure established by the employer in *Argix,* as has been established by the Employer in the instant case. Given such distinctions, I do not find that *Argix* requires a finding that the drivers are independent contractors in this case.

In conclusion, considering the degree of control exercised by the Employer and weighing all the factors discussed above, I find that the drivers are employees under the Act.

Accordingly, I decline to dismiss the petition based on the contention that the drivers are independent contractors and I find that they are employees within the meaning of Section 2(3) of the Act.[31]

[31] In reaching this conclusion, I do not find it necessary to determine whether Driver Stirling is actually bound by the Agreement since I find that Stirling is subject to the same working conditions as are the

5. I find that the petitioned-for unit constitutes an appropriate unit within which to conduct an election with one modification. The parties do not dispute the appropriateness of the petitioned-for unit. The drivers share a substantial community of interest, since they all work for the Employer out of the same location, perform the same work, under the same supervision and management, and are under the same pay rate system. The only employee other than office employees and drivers employed by the Employer is the yard employee, who appears to be residual to the drivers' unit since he is not an office clerical, performs manual labor on the Employer debris boxes and at times performs maintenance work on the drivers' trucks. Accordingly, I will include the yard employee in the unit with the drivers as a residual employee.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time truck drivers and yard employees employed by the Employer at its San Rafael, California facility; excluding office clericals, managerial employees, guards and supervisors within the meaning of the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit*(s)* who were employed during the payroll period

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other drivers whose execution of the Agreement is undisputed, and I find that Stirling is also an employee of the Employer under the Act.

ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by TEAMSERS UNION, LOCAL 624.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB. Wyman-Gordan Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that with 7 days of the date of this Decision 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with

the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility,* 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before February 15, 2005. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by February 22, 2005.

Dated at San Francisco, California, this 8th day of February, 2005.

/s/ Robert H. Miller
Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735